IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2163 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NEW INDIA ASSURANCE CO LTD - Appellant(s)
Versus
SHANTABEN WD/O SHANKERBHAI MOHANBHAI & 5 - Defendant(s)

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Appearance :
MR SANDIP C SHAH for Appellant(s) : 1,
MR DHARMESH V SHAH for Defendant(s) : 1 - 4.
NOTICE SERVED for Defendant(s) : 5 - 6.

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 05/03/2007

ORAL JUDGMENT

1. The appellant New Indian Assurance Co. Ltd., has challenged the judgment and award of the Motor Accident Claims Tribunal [Auxi-III], Nadiad passed in MACP No.

869/1987 dated 2nd January, 1997, in this appeal, which is filed under Section 173 of the Motor Vehicles Act, 1986 [hereinafter referred to as the “Act”]. By the said award th Tribunal has granted compensation to respondents no. 1 to 4 who are the original claimants, Rs.60,000=00 together with interest at the rate of 12% per annum, from the date of the petition till realization and proportionate costs.

2. The claimants filed the aforesaid petition to claim compensation of Rs.60,000=00 for the death of one Shankarbhai Mohanbhai husband of original claimant no. 1 and father of the original claimants no. 2, 3 and 4, who died in a vehicular accident that occurred on 25th June, 1985. It appears from the record that deceased Shankarbhai had hired the offending vehicle namely, tractor bearing registration no. GJU 7151 for attending social function at village Chhipadi. It also appears from the record that a trolley was attached to the tractor to carry the passengers. After attending the function, the deceased and his relatives who were returning to their residence, at that time the deceased was sitting on the mudguard of the tractor. It was around 6-7 o'clock in the evening, when the tractor reached near Surashamel bus stand, to save two cyclists and collision with ST bus,

the driver of the tractor all of a sudden applied the breaks. As a result of this, the deceased who was sitting on the mudguard got thrown off the tractor and his head was crushed under the wheel of the tractor. He died instantaneously. It is the say of the claimants that due to rash and negligent act of the driver of the tractor i.e., original opponent no. 1 and present respondent no. 5 the accident occurred. They, therefore, filed the claim petition for obtaining compensation of Rs.60,000=00. The claim was resisted by respondents no. 6 i.e., the owner of the tractor by filing written statement at Exh. 11 wherein, the entire case of the claimants was denied. The appellant filed written statement at Exh. 9. The averments made in the petition were denied. It was also contended that since the driver of the vehicle was not holding valid licence, the insurance company was not liable to discharge the liability.

3. On the basis of the material produced before it, including the oral evidence, the Tribunal held that the deceased lost life due to rash and negligent act of the driver of the tractor. It assessed the compensation payable to the claimants at Rs.60,000=00. The Tribunal, therefore, passed award in the terms already stated above. It further directed that original opponents no. 1,

2, 3 i.e., respondents no. 5 and 6 and the appellant to satisfy the award. Hence, this appeal.

4. I have heard Mr. Sandip Shah learned advocate for the appellant and Mr. Dharmesh Shah learned advocate for the respondents claimants. The owner and driver though served have not appeared. It is submitted by Mr. Sandip Shah that the appellant is not liable to satisfy the award because the deceased was passenger in goods vehicle. He has further submitted that the tractor was hired by the deceased for carrying the passengers. Hence, the insured had committed breach of the term of policy, since it was plied for hire and reward. Lastly, he has submitted that even if the tractor is not considered to be goods vehicle, the liability of the insurance company will be limited to the extent of Rs.50,000=00 and not beyond that. In support of his submission, Mr. Sandip Shah has placed reliance on the decisions of the Apex Court as well as this Court.

5. As against that Mr. Dharmesh Shah has supported the judgment and has submitted that the there is no need to interfere with the award. The insurer and the driver are not present.

6. It is almost an admitted fact as transpire from the record that the deceased had hired vehicle namely tractor together with trolley to enable him and his relatives to go to village Chhipadi for attending social function. While returning he was sitting on the mudguard of the tractor. These facts are stated in the claim petition as well as in the FIR, which is produced on record and also in deposition of the witness. According to Mr. Shah when the trolley is attached with the tractor, trolley being goods vehicle, the entire unit becomes goods vehicle. In support of his submission, he has placed reliance on the decision of the Apex Court in the case of **Natwar Parikh & Co. Ltd., v. State of Karnataka & Ors., reported in 2006 (1) GLR pg. 1**. In the said decision, it is rendered that while dealing with the provisions under the Karnataka Motor Vehicles Taxation Act, 1957 as well as the provisions of the Act, the Apex Court has stated that the tractor and trolley used as combined vehicle for transportation of the goods, it would be considered as goods carriage and consequently a transport vehicle. There is no dispute that in the instant case the trolley was attached to the tractor. Of course, it was not meant for carriage of goods but for carriage of passengers. Nevertheless, it can well be visualized since the deceased and the relatives were to

stay overnight at village Chhipadi, to attend the function, they might have carried their luggage with them. In the circumstances, it could well be considered as goods vehicle, or if not goods vehicle atleast as transport vehicle, since the vehicle was used or adopted to be used for carriage of the passengers for hire and reward. Admittedly, the vehicle was hired for carrying the passengers. In view of the aforesaid, it is doubtful whether the vehicle could be strictly called goods vehicle and carriage of passengers in such goods vehicle is prohibited and the insurance company will not be liable in such case. But at the same time, there is no doubt in my mind that the vehicle was hired for carrying the passengers. Therefore, it was driven in a contravention of the term of the policy. The term of the policy prohibits the vehicle being used for hire and reward. When there is breach of the term of the policy, the insurance company can avoid its liability to pay compensation or indemnify the insured. In the case of **Dattu Nathu Kudekar & Anr. v. National Insurance Co. & Ors.,** the Division Bench has rendered the decision which **reported in 1991 (1) GLR pg.534**. In the said decision, it is held by the Division Bench, that when the private carrier is allowed to be used by the owner by another for hire or reward and when the accident takes place, the

insured cannot contend that he should be indemnified by the insurer. The policy absolves the insurer and the law does not help the insured. The present case stands covered by the ratio laid down in this case by the Division Bench. The policy is on record at Exh. 21. It prescribes the limitation as to use. It says only the use under the private carrier permit, within the meaning of M.V. Act, 1930. The policy does not cover (i) use for hire or reward, (ii) organized racing, pace making, reliability trial or speed testing. Thus, it is obvious that the insured has committed breach of the term of the policy and, therefore, the appellant stands absolved from its liability to indemnify the insured. To that extent the finding of the Tribunal is erroneous and it is required to be quashed and set aside and it is hereby quashed and set aside. The appellant stands absolved from its liability.

7. So far as the quantum is concerned, the Tribunal has considered the evidence and has awarded Rs.43,200=00 towards the loss of dependency benefit. Rs.20,00=00 towards expectation of life and Rs.2,000=00 towards expenses of obsequious rights. In all Rs.65,200=00. I have perused the discussion on the same and I do not find any error having been committed by the Tribunal. Since

the claim is restricted to Rs.60,000=00 the Tribunal has made the award of Rs.60,000=00.

8. The question is that whether the claimants will now have to turn to the insured for recovery of the amount of compensation awarded to them by the Tribunal. In the instant case, the answer could be in negative. It may be noted here that initially at the preliminary hearing of the appeal, this Court had granted stay of the execution of the award conditionally by order dated 4th December, 1997, requiring the insurance company to deposit a sum of Rs.25,000=00 in the Registry of this Court. Subsequently, on 12th April, 1999, the learned Single Judge directed the appellant to transmit the full amount of award along with costs and interest with the Tribunal within eight weeks from the date of the order. The learned Judge also directed that Rs.25,000=00 deposited with this Court be transmitted to the Tribunal. The learned Judge further directed that the entire amount along with interest should be invested in the FDRs with Nationalized Bank for a period of five years. In pursuance of the said direction, the entire amount together with interest has now been deposited in the FDRs. The claimants have been given only the amount of costs. It may further be noted that the accident occurred

in the year 1985. The claimants are the widow and the children of the deceased. At the relevant point of time, they were minor. It is almost 22 years by now that they have been left without any compensation for the loss of their bread-winner. If now they are called upon to transcribe their remedy to recover the amount from the insured it is highly doubtful whether they will be able to do it. The insured and the driver though served have remained absent and they are not before this Court. In similar situation the Apex Court in the case of **National Insurance Co. Ltd., v. Kusum Rai & Ors., reported in (2006) 4 SCC 250** observed that in the peculiar facts and circumstances of the case namely, the age of the victim, the poor background of the claimants, non-appearance of the owner of the vehicle and the difficulty likely to be faced by the claimants in securing his presence, interference under Article 136 with the impugned order declined but liberty granted to the insurer to recover the amount from the owner of the vehicle in the manner as directed in Nanpappan case (2004) 13 SCC pg 224. As already stated above, the claimants are coming from the lower strata of the society and they do not seem to be financially well off. In the circumstances, ends of justice would meet if the Tribunal is directed to enacash the FDRs and pay the award amount to the claimants by

A/c. Payee cheque together with interest accrued thereon. At the same time the insurance company i.e., the appellant will be at liberty to recover the amount from the insured in the manner as prescribed in the case of **Oriental Insurance Co. Ltd., v. Nanjappan reported in (2004) 13 SCC pg 224**.

9. Thus, this appeal is allowed with no order as to costs.

R & P to be re-transmitted to the Tribunal forthwith.

[Akshay H. Mehta, J.]

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